

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)**

AT ARUSHA

CIVIL APPEAL NO.16 OF 2017

(Arising from the judgment of the Resident Magistrate Court of Arusha as per Hon. Mwankuga SRM) dated 27 / 02/ 2017 in Civil Case No.23 of 2016)

AIRTEL TANZANIA LIMITED APPELLANT

VERSUS

DOMINICIAN NJAU 1ST RESPONDENT

TUMAINI PAULO 2ND RESPONDENT

MAIGE, J

JUDGEMENT

At the Resident Magistrate Court of Arusha (henceforth "the trial court"), the first respondent was successful in a suit against the appellant and the second respondent for damages arising from negligence. He was awarded **TZS 8,000,000/=** as special damages and **TZS 3,000,000/=** as general damages. Being aggrieved by the judgment, the appellant has filed the above appeal questioning the correctness of the judgment of the **trial court** on five respects.

The first respondent claimed in evidence that; as a result of the negligent omission of the appellant to block his account, the same was used by unknown persons to defraud **PW-2, PW-3** and **MR. THOMAS LINGALINGA**. It is no doubt because of that reason that even the framed issues were not answered against the second respondent. The first two issues, it is apparent, were framed against the appellant alone. The last two issues though framed generally, were not answered against the second respondent as well. Therefore, in resolving the third issue, the trial magistrate stated as follows:-

The court is on considered view that as per exhibit P3, P4,P5, respectively, the plaintiff managed to prove the specific damages of Tshs. 8,000,000 which he had refunded three people i.e. PW2, PW3 and Mr. Thomas Lingalinga who had sent him money after he had been asked to do so by unscrupulous persons who were personating themselves to be the plaintiff as shown by exhibit 7.

In its written statement of defense, the appellant not only challenged the factual validity of the suit but the jurisdiction of the **trial court** to entertain the suit as well. The gist of the objection was that; as the dispute was within the purview of sections 40 and 41 of the Act, the jurisdiction of the **trial court** was implicitly excluded. In his decision overruling the preliminary objection dated 4th of May 2016, the trial magistrate, while

agreeing that this dispute could have been brought under the respective forum, was of the view that the respective provision did not exclude the jurisdiction of the ordinary courts to entertain the dispute.

In his fifth ground of appeal, the appellant challenges the **trial court** for determining the dispute which was not within its jurisdiction. In his written submissions, Mr. Robert Mugoha, learned advocate for the appellant submitted that; since the dispute falls under sections 40 and 41 of the Act, the jurisdiction of the **trial court** to entertain the same is constructively excluded in terms of section 7(1) of the CPC. The counsel placed heavy reliance on the authority of the Court of Appeal of Tanzania in **TANZANIA REVENUE AUTHORITY VS. TANGO TRANSPORT COMPANY LIMITED, CIVIL APPEAL NO. 84 OF 2009**

In his submissions in reply, Mr. Asubuhi Yoyo, learned advocate for the first respondent appears to be in agreement with the counsel for the appellant that; the dispute at hand falls with the parameters of section 40 and 41 of the Act. His point departure is such that there is no express provision in the Act excluding the jurisdiction of the **trial court**. The second respondent did not for obvious reason, enter appearance. I thus allowed the appeal to proceed in his absence. For the reasons that shall be apparent gradually as I proceed, I find it necessary to dispose of the jurisdictional issue first.

Section 40 (1) confers jurisdiction to the Authority to deal with any complaint against a supplier of regulated goods or services in relation to any matter connected with the supply , possible supply or purported supply of goods and service. Section 3 of the Act defines “regulated service” to mean “any service supplied or offered for supply in regulated sector and includes services which the Authority declares to be such services under section 46”. “Regulated sector” being, according to section 3 of the Act broadcasting, postal service , allocation and management of radio spectrum and converging electronic technologies including the internet and other Information Communication and Technologies (ICT) applications”. In my view, the phrase “other Information Communication Technologies applications” cover mobile phone communications.

Under section 40(2) of the Act, any affected person may refer a complaint to the attention of the Authority against any supplier of goods or services. On investigation, the Authority, if it finds appropriate, may refer the complaint to the supplier for consideration or reconsideration as the case may be. If the dispute is not resolved within 60 days from the date when it was brought to the attention of the Authority for investigation, the complainant may refer the matter to the Authority for determination by its Committee. On reference, the Unit established under subsection 7 of section 40 of the Act shall investigate into the complaint and attempt an amicable settlement. In the event of failure to settle the dispute amicably,

the Unit has to submit to the Authority its findings and recommendations for determination in terms of subsection 9 of section 40 of the Act. Under section 41 of the Act, the Authority may, among others, order for specific performance and refunds. It may also grant such other relief as may be deemed necessary and reasonable. A person aggrieved by an award of the Authority may, under section 42(2) of the Act, appeal to the Fair Competition Tribunal.

From the provisions of section 40 and 41 of the Act, I will agree with the counsel for the appellant that the dispute at hand is within the jurisdiction of the Authority. The issue which I have to determine therefore, is whether the existence of the said dispute settlement machinery has the effect of ousting the jurisdiction of the **trial court**. This issue cannot consume much of my time. Under section 7 (1) of the **CPC**, I agree with Mr. Mgoha, the jurisdiction of subordinate courts to deal with civil matters is excluded in respect to the suits " of which their cognizance is either expressly or implied barred".

In **TANZANIA REVENUE AUTHORITY VS. KOTRA COMPANY LTD, CIVIL APPEAL NO. 12 OF 2009** quoted with approval in **TANZANIA REVENUE AUTHORITY VS. TANGO TRANSPORT COMPANY LIMITED (supra)**, the Court of Appeal of Tanzania was of the binding opinion that, where a special forum has been established by law, an


ordinary court would not entertain the matter unless the aggrieved party satisfies itself that no appropriate remedy is available in that special forum. In this case, while accepting that the dispute is covered under the forum under discussion, the first respondent did not satisfy the Court that there was no appropriate remedy under the said special forum. For that reason therefore, I agree with the appellant that the **trial court** did not have jurisdiction to entertain the dispute.

The clever drafting of the plaint to irrelevantly implead the second respondent cannot confer jurisdiction to the **trial court** since the Court of Appeal has held in **TRA VS. NEW MUSOMA TEXTILES LIMITED, CIVIL APPEAL NO. 93 OF 2009** that; where the substance of the matter is such that the jurisdiction of the court is barred by law, the plaintiff cannot be allowed to circumvent the bar by the clever drafting of the plaint. Failure of the respondent to adduce any evidence linking the second respondent with the suit justifies an inference that he was impleaded with a view to circumventing the jurisdiction of the Authority.

For those reasons and to the extent as aforestated therefore, the appeal is allowed. The judgment of the **trial court** is set aside and the proceedings thereof quashed with costs.

It is so ordered

Right to appeal is explained.


I. MAIGE

JUDGE

23/10/2018

Judgment delivered this 23th October 2018 in the presence of Mr. Mgoha learned advocate for the appellant and Mr. Athubuhi Yoyo, learned advocate for the 1st respondent and in the absence of the 2nd respondent.




I. MAIGE

JUDGE

23/10/2018